

BY THE U.S. GENERAL ACCOUNTING OFFICE  
Report To The Chairman, Subcommittee  
On Manpower And Housing  
Committee On Government Operations  
House Of Representatives

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## Problems Persist In The EEO Complaint Processing System For Federal Employees

The system for processing Government employees' discrimination complaints continues to be plagued with problems, most notably the lengthy period it takes to process complaints. Complaints closed by decision on the merits in fiscal year 1981 were in process an average of 611 days--more than twice as long as in fiscal year 1974--with some agencies averaging over 1,000 days. Based on data provided by the Equal Employment Opportunity Commission, the cost to process complaints closed in 1981 could have been as much as \$456 million.

Proposals to change the system, made in late 1981 by a multiagency task force and in draft regulations prepared by staff of the Equal Employment Opportunity Commission, are among options currently under consideration by the Commission Chairman.



GAO/FPCD-83-21  
APRIL 7, 1983

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WASHINGTON, D.C. 20548

FEDERAL PERSONNEL AND  
COMPENSATION DIVISION

B-178929

The Honorable Barney Frank  
Chairman, Subcommittee on  
Manpower and Housing  
Committee on Government Operations  
House of Representatives

Dear Mr. Chairman:

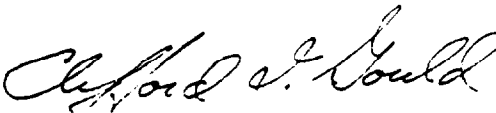
This report discusses the continuing problems with the discrimination complaint processing system for Federal employees and some proposed changes. Our review was undertaken in response to the November 16, 1981, request from the former chairwoman of your subcommittee.

A draft of this report was reviewed by the Chairman of the Equal Employment Opportunity Commission, and his comments are included. However, as requested by the subcommittee office, we did not obtain comments from other organizations whose activities are discussed.

As discussed in the report, there appears to be a question about what to do where conflicts exist between the requirements of civil service law and remedies prescribed under the Civil Rights Act of 1964, as amended. No order of preference has been expressly provided for resolving such conflicts. Your subcommittee may wish to refer this to the committees having jurisdiction over the matter.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 10 days from the date of the report. At that time, we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,

  
Clifford I. Gould  
Director

GENERAL ACCOUNTING OFFICE  
REPORT TO THE CHAIRMAN  
SUBCOMMITTEE ON MANPOWER  
AND HOUSING  
COMMITTEE ON GOVERNMENT  
OPERATIONS  
HOUSE OF REPRESENTATIVES

PROBLEMS PERSIST IN THE EEO  
COMPLAINT PROCESSING SYSTEM  
FOR FEDERAL EMPLOYEES

D I G E S T

The system for processing Government employees' discrimination complaints continues to be plagued with problems, most notably the lengthy period it takes to process complaints. At the request of the former Chairwoman, Subcommittee on Manpower and Housing, House Committee on Government Operations, GAO made a study to identify problems with the system, their causes, and proposed measures to correct them.

COMPLAINT PROCESSING TIME  
AND CASE BACKLOG ARE INCREASING

Complaints closed by decision on the merits in fiscal year 1981 were in process an average of 611 days. This was more than twice as long as it took for such complaint closures in fiscal year 1974. Some agencies averaged over 1,000 days to arrive at a decision on the merits.

During 1981, the number of complaints in process rose to over 15,800, a 15-percent increase in the number of complaints over the previous year. Based on data provided by the Equal Employment Opportunity Commission, the cost to process 11,400 complaints closed during the year could have been as much as \$456 million. (See pp. 5 to 9.)

IDENTIFIED PROBLEMS AND  
PROPOSED SOLUTIONS

Reports and staff studies issued during the past 6 years have repeatedly identified systemic problems. There is considerable evidence that the system is inefficient and that there has been poor case management by the agencies involved.

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APRIL 7, 1983

Tear Sheet

In late 1981, a task force comprised of representatives from 13 departments and agencies reported on a study it made of the complaint processing system. Problems the task force reported included the following:

- Considerable duplication of effort exists under the system.
- The system has too many decisionmaking levels.
- Many complaints not warranting full processing cannot be rejected.
- The system lacks procedural flexibility.

The task force made a number of recommendations, the most significant of which was that each agency be permitted to establish its own complaint processing system, within carefully prescribed limits. The task force believed this proposal would solve most of the system's problems. (See pp. 10 to 15.)

Near the end of 1981, the Equal Employment Opportunity Commission, which is responsible for providing management oversight of the system, provided a draft of proposed new regulations for complaint processing to the task force. A primary provision of the proposed regulations would eliminate the counseling stage before a formal complaint is filed and begin the process with an interview handled by a trained equal employment opportunity specialist. (See pp. 15 to 17.)

The task force and the Commission agree that the system should be changed, and there is some agreement between them on what changes are needed. However, the Commission does not agree with the task force's proposal that each agency be permitted to establish its own system. The Commission believes if this were permitted, it would be unable to provide effective oversight of the various systems.

This task force proposal is also opposed by several employee unions and the U.S. Commission on Civil Rights. (See pp. 17 and 18.)

Similarly, nine agencies commented on the Commission's proposed new regulations and collectively had many reservations about them, such as their lacking flexibility and creating additional financial and personnel resource needs. (See pp. 18 and 19.)

AGENCIES ARE CRITICAL OF THE  
EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

Representatives of many agencies said the Commission frequently issued decisions on complaints that were either contrary to civil service law or impractical to carry out. Consequently, the agencies refused to implement these decisions, or they requested reconsideration. The Commission has no authority to force agency compliance with its decisions. (See pp. 21 to 25.)

Agency representatives also reported that they had difficulty dealing with the Commission's Office of Review and Appeals, which reviews and renders decisions on complainants' appeals of agencies' decisions. Problems identified by the agency representatives included

- losing case files,
- rendering duplicate and inconsistent decisions, and
- being uncooperative and failing to provide guidance.

Before GAO completed its review, the Commission had taken a number of measures and planned to take others to improve operations in its Office of Review and Appeals.

GAO believes the problems agencies allege to have had with Commission decisions and dealing with the Office of Review and Appeals, perhaps more than any others, have created a lack of agency confidence in the Commission's ability

to provide oversight of the discrimination complaint processing system. (See pp. 21 to 24.)

#### PROPOSALS BEING STUDIED

When GAO prepared this report, the Commission Chairman was continuing to review options for new regulations to govern the system. The options included the task force's proposal and the Commission's proposal. (See pp. 19 and 20.)

#### CONCLUSIONS

Problems with the complaint processing system are not new; they have been reported in studies and reports for a number of years.. However, to date, no one has developed a practical solution.

GAO hopes that the current efforts of the Commission Chairman will result in the system's becoming more effective and efficient. However, GAO is concerned that, no matter whether the system is revised or replaced by a new one, its effectiveness and efficiency will continue to be impaired unless a sense of mutual respect and trust develops between the agencies and the Commission. (See p. 26.)

#### AGENCY COMMENTS

As arranged with the subcommittee's office, the Commission was the only organization asked to comment on the draft of this report. The Commission said that the report raised a number of legitimate criticisms and informed GAO it had undertaken a number of initiatives to correct problems discussed in this report. These included preparing interim regulations that deal with issues raised by agencies and making significant operating and management improvements in the Office of Review and Appeals.

The Commission questioned the accuracy or the range of impact of some matters discussed in the report draft. GAO made clarifying revisions to deal with the Commission's concerns, as appropriate. (See pp. 27 and 28.)

# C o n t e n t s

		<u>Page</u>
DIGEST		i
CHAPTER		
1	INTRODUCTION	1
	How the system works	1
	Objectives, scope, and methodology	2
2	COMPLAINT PROCESSING TIME, CASE BACKLOG, AND COSTS	5
	Studies assert that systemic problems delay complaint processing	5
	Complaint processing time and case backlog are increasing	5
	Agency representatives cite delays at both hearings and appeals levels of EEOC	7
	Union representatives cite problems in case management	7
	Complaint processing costs	8
3	IDENTIFIED PROBLEMS WITH THE COMPLAINT PROCESSING SYSTEM AND PROPOSED SOLUTIONS	10
	Task force identified problems and proposed solutions	10
	EEOC has proposed new regulations	15
	Some agreement exists between task force and EEOC	17
	Disagreement with task force proposal for individual systems	17
	Agencies generally disagreed with EEOC's proposed regulations	18
	Status of proposed changes	19
4	OTHER PROBLEMS LIMITING THE SYSTEM'S EFFECTIVENESS	21
	Agencies are critical of many EEOC decisions	21
	Management problems at ORA	22
	EEOC cannot enforce its decisions	24
5	CONCLUSIONS	26
6	AGENCY COMMENTS	27



		<u>Page</u>
APPENDIX		
I	Agencies, Unions, Management Groups, and Agency EEO Advisory Councils Contacted	29
II	Letter dated November 16, 1981, from the Chairwoman, Subcommittee on Manpower and Housing, House Committee on Government Operations, to the General Accounting Office	31
III	Letter dated January 14, 1983, from Chairman, EEOC, to the General Accounting Office	33
IV	Letter dated September 27, 1982, from Chairman, EEOC, to the Chairwoman of the Subcommittee on Civil Service, House Committee on Post Office and Civil Service	40

#### ABBREVIATIONS

EEO	equal employment opportunity
EEOC	Equal Employment Opportunity Commission
GAO	General Accounting Office
OMB	Office of Management and Budget
ORA	Office of Review and Appeals

## CHAPTER 1

### INTRODUCTION

The system for resolving employment discrimination complaints is an important aspect of the Government's promoting equal treatment of Federal employees. The complaint processing system was established to help protect employees' rights and is a highly visible indicator of agency commitment to equal employment opportunity (EEO). If it fails to adequately process discrimination complaints and deal with discrimination issues, the system can have a negative effect on the credibility of the Federal EEO effort.

Before 1965, the President's Committee on Equal Employment Opportunity had primary responsibility for coordinating the Government's EEO program. In January 1965, the Committee delegated authority for operating the discrimination complaint processing system to the Civil Service Commission, now the Office of Personnel Management, because the limited size of the Committee's staff made it difficult to close cases promptly. During the ensuing 14 years, the Civil Service Commission was responsible for the system and issued guidance to Federal departments and agencies on how the system should operate.

On January 2, 1979, in accordance with Reorganization Plan No. 1 of 1978, issued pursuant to 5 U.S.C. 901 et seq., responsibility for overseeing Federal EEO efforts was transferred to the Equal Employment Opportunity Commission (EEOC).

### HOW THE SYSTEM WORKS

The system operates as follows:

- An applicant or an employee who believes he/she has been discriminated against takes the problem to an agency EEO counselor, who attempts to resolve it.
- Should the counselor's efforts fail, the person may file a formal complaint which the agency investigates. Upon completing its investigation, the agency makes the case records available to the complainant and attempts to settle the matter.
- Should the attempt at settlement fail, the agency presents the complainant with a proposed disposition of the case. The complainant can request a final agency decision or, if not satisfied with the proposal, can ask for a hearing before an EEOC complaints examiner.
- If a hearing is requested, the case is sent to EEOC. A complaints examiner then holds a hearing on the matter and issues a recommended decision to the agency.

- The agency then issues a decision which may or may not coincide with the recommendations made by EEOC's complaints examiner.
- If the complainant is not satisfied with the agency decision, he/she may appeal that decision to EEOC's Office of Review and Appeals (ORA) which issues the final decision. However, EEOC is not empowered to require agencies to comply with its final decisions. (See p. 24.)
- If the complainant or the agency is not satisfied with ORA's decision, either party can request reconsideration by EEOC's commissioners.

Complainants filing on any basis other than age can take civil action in the courts, but they must first exhaust the administrative process, that is, they must receive an agency decision. The complainant may also initiate a civil action if the agency processing time exceeds 180 days. A complainant filing on the basis of age discrimination may choose not to follow the administrative process and file a civil action after providing EEOC with a 30-day notice of intent.

#### OBJECTIVES, SCOPE, AND METHODOLOGY

On November 16, 1981, the Chairwoman, Subcommittee on Manpower and Housing, House Committee on Government Operations, asked us to review the discrimination complaint processing system. (See app. II.) When the Chairwoman made her request, there was a general recognition that the system was not working well. On January 21, 1982, we informed the subcommittee office that EEOC had drafted new regulations governing the system's operations and that a task force comprising representatives from 13 agencies, working under the Assistant Secretaries for Management, had been studying what it believed were the major system problems and proposed ways to correct them. Accordingly, arrangements were made with that office that our review objectives would be to:

- Examine the support for the task force's and EEOC's determinations of the problems with the current system.
- Analyze the causes of the problems identified in the current system and the EEOC and task force proposals to resolve them.
- Obtain the opinions of unions and other employee groups on what system problems exist and what needs to be done to resolve them.

--Obtain information on certain other matters of interest to the subcommittee to the extent that information was available. These included examples of cases affected by systemic or other problems, information on complaint processing costs, and information on EEOC's inability to apply sanctions on agencies.

We performed our work at EEOC headquarters, headquarters of the 13 departments and agencies represented on the task force, and the Office of Management and Budget (OMB). We also visited the Defense Logistics Agency because representatives of other Defense agencies said that the Agency had information pertinent to our study. Further, we contacted representatives of 10 employee unions that collectively represented more than 50 percent of the Federal work force, EEO advisory councils in 7 Government agencies, and 3 groups representing Federal managers. (See appendix I for a list of organizations and groups contacted.)

The task force relied on the experience of its members and did not prepare supporting documentation for its report. Therefore, to evaluate the problems identified, we discussed the task force report with representatives of participating agencies. We also reviewed cases illustrating the problems and documentation, such as correspondence between the agencies and EEOC, which they provided to us. We also reviewed an EEOC statistical report and previous reports of our Office covering matters relating to discrimination complaint processing in the Federal Government.

To analyze systemic problems and proposed improvements, we attended task force meetings conducted after its report was issued and interviewed representatives of EEOC and agencies participating on the task force. We also reviewed a draft of EEOC's proposed regulations governing the complaint processing system and other documents, including an "option paper" on alternative systems furnished by EEOC representatives. Further, we reviewed memoranda prepared by the Director of EEOC's Technical Guidance Division on the agreements and disagreements between EEOC and the task force and comments submitted by nine agencies on EEOC's proposed regulations.

We contacted the Federal employee unions, EEO advisory councils, and groups representing Federal managers to obtain their views on the current system's problems and potential solutions. Also, we obtained OMB data on the average cost to process an EEO complaint and discussed the impact of EEOC's lack of authority to enforce its decisions or apply sanctions with representatives of EEOC, OMB, agencies represented on the task force, and Federal employee unions.

Our review, conducted from December 1981 through June 1982, was performed in accordance with generally accepted Government audit standards.

## CHAPTER 2

### COMPLAINT PROCESSING TIME, CASE BACKLOG, AND COSTS

Between fiscal years 1974 and 1981, the time involved in processing discrimination complaints more than doubled. Also, the number of complaints in process rose 15 percent during fiscal year 1981. Evidence shows that the complaint processing system is inefficient and that case management by both the agencies and EEOC has been poor.

Based on an estimate provided by EEOC, the cost to process the 11,400 complaints closed during fiscal year 1981 could have been as high as \$456 million.

### STUDIES ASSERT THAT SYSTEMIC PROBLEMS DELAY COMPLAINT PROCESSING

In October 1980, EEOC issued a staff report on its investigation of discrimination complaint processing in the Federal Government. The report stated:

"extensive delay has been the rule, rather than the exception, and serious questions have been raised as to the levels and adequacy of relief obtained for complainants."

This observation was confirmed by the Assistant Secretaries for Management task force in its October 1981 report. The task force concluded that the system was unnecessarily time-consuming and expensive and was not well designed to determine facts or effect justice. Most of the representatives of the agencies included in our review agreed that the system needed some revisions. EEOC expressed this same view in a July 1982 staff study in which it was stated that "the data argue for a long-overdue revision of the entire complaint processing system."

### COMPLAINT PROCESSING TIME AND CASE BACKLOG ARE INCREASING

In April 1977, we reported that the Government-wide average processing time for complaints closed by decision on the merits had increased from 281 days during fiscal year 1974 to 295 days

during fiscal year 1975 and to 315 days during the first half of fiscal year 1976.<sup>1/</sup>

EEOC's July 1982 staff study contained a statistical analysis of the time agencies took to process discrimination complaints during fiscal year 1981. The study, based on data received from 62 Federal agencies, concluded that it takes far too long to close complaints. The study showed that the average time for agencies to reach decisions on the merits of cases processed during fiscal year 1981 was 611 days, or well over 1.5 years. Five agencies (each with more than 20 closures) took considerably longer, that is, nearly 2.5 to more than 3 years.

	Days
Department of Justice	1,119
Environmental Protection Agency	1,117
Department of the Interior	1,050
Department of Commerce	1,025
Department of the Treasury	878

The average times do not include the time EEOC spent processing appeals complainants filed after receiving agencies' final decisions.<sup>2/</sup> They do, however, include the average time of 261 days taken by EEOC to hold hearings and to prepare recommended decisions. (This occurred in about 28 percent of the cases.)

The EEOC staff study also showed that the number of complaints in process, Government-wide, rose from 13,734 at the beginning of fiscal year 1981 to 15,802 at the end of that year--an increase of 15 percent.

While EEOC advocates revising the complaints processing regulations, it believes the agencies could reduce their processing time under the existing system by improving case management. To support its position, the EEOC staff study cited statistics on the average number of days agencies took to reject cases during fiscal year 1981. According to the study, the 62 reporting agencies averaged 134 days to reject cases. Some agencies took considerably longer. For example, the Veterans Administration took 394 days; the Department of Energy, 294 days; the Department of Agriculture, 270 days; and the Environmental Protection Agency, 220 days.

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<sup>1/</sup>Report to the Congress, entitled "System for Processing Individual Equal Employment Opportunity Discrimination Complaints: Improvements Needed" (FPCD-76-77, Apr. 8, 1977).

<sup>2/</sup>According to EEOC records, the average time to process an appeal during fiscal year 1981 was 314 days.

In the study, EEOC pointed out that, under current regulations, there are only three distinct grounds upon which a complaint may be rejected: lack of timeliness, lack of jurisdiction, and/or the complaint is identical to one previously filed. Because of the limited grounds for rejection, EEOC concluded that the lengthy time agencies were taking to reject cases indicated a failure in the way agencies manage EEO complaints.

#### AGENCY REPRESENTATIVES CITE DELAYS AT BOTH HEARINGS AND APPEALS LEVELS OF EEOC

Several agencies commented on delays in EEOC's processing of cases at both the hearings and appeals levels. For example, Army representatives said that much of the time required to issue final agency decisions on discrimination complaints was caused by EEOC's delay in holding hearings. Air Force officials agreed that such delays were a problem and also said that ORA takes too long to reach its decision when a complainant files an appeal.

Postal Service representatives told us that 17 percent of their unresolved case backlog was awaiting action by EEOC complaints examiners. They said, as did representatives of other agencies, that it was unreasonable to expect agencies to process cases in 180 days when it takes a great deal of time for EEOC to hold hearings.<sup>3/</sup>

Department of Transportation representatives stated that, when hearings are requested, agencies lose control of complaints. They said the Department had requests for EEOC complaints examiners to be assigned which had been pending for over a year. Department representatives also said that, unless EEOC finds a way to expedite the hearings, agencies' attempts to process cases promptly will be undermined by delays at the hearing stage. EEOC representatives said their agency lacked the resources and personnel to enable them to be more responsive to agency requests for complaints examiners.

#### UNION REPRESENTATIVES CITE PROBLEMS IN CASE MANAGEMENT

The President of the National Federation of Federal Employees informed us that, when he is asked to comment on the Federal

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<sup>3/</sup>The Equal Employment Opportunity Act of 1972 provided that, if complaints were not resolved within 180 days from the filing date, the complainant could take his/her case to court.



EEO process, the first word that comes to mind is "delay," and the second is "frustration." He believed agencies do not attempt to adhere to any time frames or adjudicate cases quickly. He said ORA was the worst offender, contending that delays of 2 to 3 years by that organization are not unusual.

The President of the National Treasury Employees Union stated that, in case after case, the discrimination complaint processing system was "woefully" slow and that the system appeared to be designed more to discourage the filing of complaints than to promote fairness and equal opportunity. He cited several examples of delays, including the following cases:

--An employee filed a sex discrimination complaint in October 1979, and a hearing was held in June 1981. As of November 1982, no decision had been rendered.

--An employee filed two sex discrimination complaints, one in January 1977 and the other in June 1979. Agency investigation of the complaints was not completed until July 22, 1981, meaning that the employee had to wait more than 4 years after filing the initial complaint before a hearing could be scheduled.

Comments by other union representatives indicate problems in case management and extensive time frames for complaint processing. For example, concerning the 180-day time frame for agency processing, representatives of the General Service Employees' Union said they doubted that the process started in one agency before the 178th day. According to the union representatives, the agency just seems to file the complaint and nothing happens.

Representatives of the National Alliance of Postal and Federal Employees said most cases required from 2 to 4 years to process, and it takes from 6 months to a year to assign an investigator. A representative of the American Federation of Government Employees said the only cases processed in 180 days were those which were rejected. Otherwise, it takes at least a year to assign an investigator and from 3 to 4 years to process a complaint.

#### COMPLAINT PROCESSING COSTS

There are several estimates of the cost to process EEO complaints, and these estimates vary widely. According to OMB's Special Analysis J, covering civil rights activities for the fiscal year 1983 budget, agency processing costs for fiscal year 1981 averaged about \$8,000 for each complaint closed. An EEOC statistical report showed that, during fiscal year 1981,

agencies closed about 11,400 cases. Thus, using the OMB figure of \$8,000, the total cost to Federal agencies to process EEO complaints closed during fiscal year 1981 was about \$91.2 million. However, this estimate is conservative because, according to an OMB official, the \$8,000 average cost figure did not include indirect costs.

EEOC informed us that agencies' costs of counseling, personnel benefits, and overhead, and EEOC's hearings and appeals costs were not included in the OMB estimate. EEOC suggested that a more representative average cost for processing an EEO complaint was actually between \$20,000 and \$40,000. Using these amounts, the total cost to process EEO complaints closed during fiscal year 1981 would be between \$228 million and \$456 million.

## CHAPTER 3

### IDENTIFIED PROBLEMS WITH THE COMPLAINT

#### PROCESSING SYSTEM AND PROPOSED SOLUTIONS

The Assistant Secretaries for Management task force identified problems with and proposed solutions for the complaint processing system. The problems identified and the solutions proposed were not uniformly endorsed by the participating agencies. EEOC developed an informal draft of proposed new regulations. Although some agreement exists between EEOC and the task force on the proposed changes, there are important areas of disagreement, particularly concerning the degree of flexibility that should be provided to the agencies.

At the completion of our work, EEOC's new Chairman was reviewing several options for a new complaint processing system. The options included the proposals discussed in the task force report and the proposal in EEOC's informal draft regulations.

#### TASK FORCE IDENTIFIED PROBLEMS AND PROPOSED SOLUTIONS

The task force submitted its report to EEOC on October 19, 1981. It identified problems in the current system and proposed solutions which it believed would make the system more efficient and effective. While the report represents a consensus of the participating agencies, the participants did not fully agree on either the problems identified or the solutions proposed.

#### Problems identified by task force

The major problems identified in the task force report are summarized below.

##### Duplication of effort

The task force reported that considerable duplication of effort exists under the system. The task force cited fact development--occurring during counseling, investigations, and hearings--as being duplicative. According to the report, the same information could be separately developed three times during these stages, and such duplication would increase the cost and time to process complaints.

##### Multiple levels of decisionmaking

The task force pointed out that three decisions can occur at the agency level during complaint processing: a proposed

decision (after the investigation), the complaints examiner's recommended decision (after the hearing), and the final agency decision. According to the task force, each decision requires careful review, deliberation, and drafting. In addition, the complainant is entitled to two levels of appeal at EEOC and a Federal court review. The task force believed that the careful preservation of a complainant's rights does not warrant this many decisionmaking levels.

#### Inability to dispose of complaints not warranting full processing

Under the current regulations, a complaint can be rejected if it is (1) not filed within prescribed time limits, (2) not within the purview of the regulations, or (3) identical to a complaint previously filed by the same complainant. After a complaint has been accepted for processing, it cannot be canceled unless the complainant fails to pursue it. The task force believed that numerous other cases do not deserve full processing, such as those (1) which are groundless, (2) where no relief is available, and (3) where the agency has offered full relief and the complainant has declined.

#### Lack of procedural flexibility

Current procedures are imposed on all agencies regardless of their size, organization, centralization, decentralization, or resources. According to the task force, some agencies' investigations may, by themselves, provide a sufficient basis for a final agency decision. Other agencies may not be able to conduct comprehensive investigations, for reasons such as lack of full-time investigators, and must, therefore, rely on hearings.

#### Confusion concerning alternate methods for processing complaints

There are some discrimination complaints that can be appealed to the Merit Systems Protection Board or processed either under grievance procedures negotiated with unions or through the discrimination complaint processing system. The task force reported that most of its members were confused about these procedures, that is, which process has primary jurisdiction, which proceeds first, and which may be waived.

#### Ineffective informal resolution process

The task force reported that the only prescribed informal resolution of a formal complaint is after the investigation, and this has been interpreted by some agencies as discouraging or

precluding settlement at other stages. Thus, according to the task force, needless investigations have been made where conciliation efforts may have resulted in early settlement.

#### Problems in designating an alleged discriminating official

An alleged discriminating official is the person designated by the complainant as the individual responsible for the alleged discriminatory act. The task force reported that such a personal designation is seen by many as transforming the EEO complaints process from one for civil relief to a quasi-criminal proceeding against the person so designated. The task force believed that designating an alleged discriminating official creates unnecessary tension.

#### Expedited handling of reprisal charges

If employees believe reprisal actions are taken against them because they filed discrimination complaints, they can file reprisal charges. The regulations require an agency to make an inquiry into a reprisal charge and, within 15 days after receipt of the charge, to send a copy of it and a report of action taken to EEOC. According to the task force report, none of the participating agencies complied with this expedited process. Further, the task force concluded that imposing such an impractical deadline detracted from the credibility of the regulations.

#### No standard for EEOC appellate review

According to the task force report, the standard or scope of review EEOC exercises in its appellate jurisdiction is not clear. The task force believed that EEOC does not give the deference to an agency's final decision that an appellate body should. Conversely, the task force reported that EEOC often reinstates the complaints examiner's decision when it differs from the agency's decision, without stating the basis for such action.

Questions raised by task force members concerning the scope of EEOC review include

- whether EEOC should review the agency decision in the same way an appellate court reviews a trial court decision,
- whether EEOC's review should be confined to the record, and

--what weight should be given to the various earlier decisions, such as complaints examiner's recommended decision and final agency decision.

Inconsistent application of law  
and disregard of civil service laws

The task force reported that EEOC does not apply case law consistently and often totally disregards civil service law. For example, the report stated that EEOC has ordered employees promoted to General Schedule pay grades to which agencies are legally prohibited from promoting them. (This matter is discussed further on pages 21 and 22.)

Changes proposed by task force

In its report, the task force proposed a number of changes to the discrimination complaint processing system. These proposals are summarized below.

Permit agencies to develop their  
own complaint processing system

The task force proposed that, within carefully prescribed limits, each agency be authorized to establish its own complaint processing system and provided several models to illustrate systems which the agencies might adopt. All of these models provided the complainant with the right to appeal the final agency decision to EEOC. The task force believed this proposal would solve most of the problems existing in the current system. For example, according to the task force report, each agency could establish procedures which would (1) eliminate duplication of effort and multiple levels of decisionmaking, (2) encourage informal resolution, (3) provide for expeditious disposal of complaints needlessly processed, and (4) retain, modify, or eliminate the requirement for 15-day handling of reprisal charges.

Require that decisions be  
governed by applicable law

The task force proposed that new regulations should state that decisions would be governed by applicable law. It also proposed that applicable law be defined to include not only statutes, regulations, and judicial decisions, but also decisions of district and circuit courts for the jurisdictions in which the complaints arose.

### Define the scope of EEOC review

The task force proposed that the scope of EEOC's review of agency decisions be the review normally exercised by an appellate body, that is, EEOC should affirm the agency decision unless the facts developed by the agency have no reasonable basis in the record or the decision is based on an erroneous interpretation of law. Also, there was a consensus among the task force representatives that the complainant should identify those parts of the agency decision on which he/she is basing the appeal.

### Eliminate the alleged discriminating official designation

The task force suggested that alleged discriminating officials no longer be designated. The task force believed that such designations distort the process and create needless antagonism.

### Clarify the alternate methods of processing complaints

Because of the confusion concerning the alternate methods of processing complaints, the task force suggested there be specific provisions in the new regulations describing how the complainant should elect the appropriate method to follow. Also, the task force believed the complainant should be given only one administrative forum in which he/she may challenge the personnel action.

### Establish additional grounds for rejecting or canceling complaints

The task force reported that many cases do not justify complete processing but cannot be rejected or canceled under current regulations. The task force therefore proposed that the new regulations provide for rejecting or canceling cases in which

- the full relief to which a complainant would be entitled is offered as settlement;
- no relief is available under the law;
- the complainant cannot be located;
- the complainant has elected to pursue the matter in another arena, such as with the Merit Systems Protection Board or under negotiated grievance procedures; and

--the complaint is, in actuality, a class complaint--such as when an individual alleges that he/she was a victim of an agency's policy or practice which excludes members of a protected class--unless the complainant clearly discloses that he/she wishes to proceed individually.

#### EEOC HAS PROPOSED NEW REGULATIONS

In December 1981, EEOC provided a draft of proposed new regulations to the task force. The most significant proposed changes follow.

##### New procedure for receiving complaints

Under the current system, a complainant must contact an EEO counselor within 30 days after the alleged discriminatory act or within 30 days from the effective date of a personnel action in which discrimination is alleged. After the counselor's final interview, the complainant is given written notice of his/her right to file a formal complaint.

The proposed system eliminates the counseling stage before filing a complaint. Under the proposed system, a complainant would have to file a complaint with the designated office within 90 days from the date of the alleged violation or the date the individual should have learned of the alleged violation. The proposed process would begin with what EEOC refers to as the "professional intake" step, which would consist of an interview handled by a trained EEO specialist.

According to EEOC officials, professional intake can expedite the complaint process by providing employees with counseling and the opportunity to file at the same time and by screening out complaints that should not be considered under the system. The EEOC officials believe that professional intake will ensure that all complaints filed will be clear and in enough detail to help agencies respond to the complaints and seek resolution of the issues raised.

##### Settlement procedures at all stages of complaint processing

The current regulations emphasize settlement after investigation. Some agencies interpreted this to mean settlement should be attempted only after an investigation. Other agencies attempted settlement at various stages during complaint processing. EEOC's proposed regulations encourage the parties to resolve the complaint voluntarily throughout the process. EEOC



believes voluntary settlements could help make the system more timely and less costly.

#### Specific investigative techniques

EEOC's proposed regulations provide considerable directions on how to conduct an EEO investigation in contrast to current regulations which provide little such direction. Techniques established by the proposed regulations include developing comprehensive investigative plans, requesting detailed documentary evidence before site visits, and convening factfinding conferences. A factfinding conference to reduce disagreement about facts and to attempt settlement would consist of a face-to-face meeting between the two parties, their representatives, and the investigator shortly after the complaint is filed.

#### Complainants would have no automatic right to a hearing

The current system grants each complainant the right to a hearing if the complaint is not resolved after the investigation. The complainant has 15 calendar days after he/she receives notice of the proposed disposition to request a hearing. Under the system proposed by EEOC, the complainant could still request a recommended decision by a complaints examiner if the complaint is not resolved after investigation. However, the complaints examiner would not have to hold a hearing unless he/she elects to do so at the complainant's request.

#### New reasons provided for an agency to dismiss a complaint

The proposed regulations would introduce several new grounds for rejecting or canceling a complaint. These include the following:

- The complainant has previously filed a complaint on the same matter before another forum, such as the Merit Systems Protection Board.
- The complainant fails to cooperate to the degree that it is impossible for the designated office to resolve the complaint.
- The complainant cannot be located after reasonable efforts have been made to do so.
- The complainant refuses to accept full relief.

### Other changes

The draft regulations would withdraw the requirements to (1) designate an alleged discriminating official and (2) expedite processing of reprisal charges.

### SOME AGREEMENT EXISTS BETWEEN TASK FORCE AND EEOC

EEOC and the task force agree that changes are needed. Also, there is some agreement between EEOC and the task force on what needs to be changed. For example, they agree that the alleged discriminating official concept and expedited reprisal system should be eliminated and that greater emphasis is needed on voluntary resolution. These changes are incorporated in the proposed regulations.

According to a knowledgeable EEOC official, EEOC and the task force were in conceptual agreement on the need to

- eliminate duplicate stages of processing,
- find a more cost-effective means of dealing with complaints which appear frivolous in nature,
- establish new bases for dismissing complaints,
- professionalize intake, and
- provide greater procedural flexibility.

However, a mutually acceptable means for achieving these goals has not been established.

### DISAGREEMENT WITH TASK FORCE PROPOSAL FOR INDIVIDUAL SYSTEMS

The major disagreement between EEOC and the task force is the degree of procedural flexibility that should be provided to the agencies. An EEOC official said that, if each agency developed its own system, there would be as many as 106 different sets of regulations and procedures for complaint processing. He pointed out that complaints examiners and ORA attorneys would then be required to review the applicable procedures before conducting a hearing or appeals review. Further, he said that EEOC would be unable to provide effective oversight of the various systems established by the agencies.

While the task force, as a body, strongly favored providing the agencies with the authority to establish their own processing systems, some agency representatives disagreed with this proposal. A Department of Transportation representative said that varying systems would result in differences among agencies in the scope and effectiveness of safeguards provided. Department of the Interior representatives believed the current system provides enough flexibility.

Union representatives and the U.S. Commission on Civil Rights generally disagreed with the task force proposal to permit agencies to develop their own complaint processing systems. Representatives of three different unions--the National Alliance of Postal and Federal Employees, the American Postal Workers Union, and the American Federation of Government Employees--stated, in only slightly different terms, that giving the agencies authority to establish their own systems would be like letting the "fox guard the chicken coop." A representative of the National Federation of Federal Employees said creating different systems would cause more problems than it would solve and would make it impossible for employees, EEOC, attorneys, and the courts to keep track of the various processes.

In a January 20, 1982, letter to OMB, the Acting Staff Director of the U.S. Commission on Civil Rights stated that:

"\*\*\* given budget constraints, we believe EEOC is justified in maintaining that creation of additional varied procedures for processing complaints would make it more difficult for staff to monitor and process appeals than under one set of procedures."

The Commission believed that multiple complaint systems, without regulatory guidance, would make it almost impossible for EEOC to ensure administrative fairness.

#### AGENCIES GENERALLY DISAGREED WITH EEOC'S PROPOSED REGULATIONS

Nine agencies commented on EEOC's proposed regulations and collectively had many reservations about them.<sup>4/</sup> For example, the Department of Defense said the proposed regulations would not improve the current complaint processing procedures. Major

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<sup>4/</sup>The agencies that commented on EEOC's proposed regulations were the Departments of Defense, Energy, Education, Health and Human Services, the Interior, Commerce, and the Treasury; the Merit Systems Protection Board; and the Postal Service.

problems cited by the agencies included (1) lack of flexibility allowed, (2) eliminating the counseling stage where, according to one agency, as many as 80 percent of the complaints are resolved, (3) generating the need for increased financial and personnel resources, occasioned by agencies having to add professional EEO specialists to their staffs, and (4) lack of clarity and comprehensiveness.

#### STATUS OF PROPOSED CHANGES

On June 10, 1982, the Acting Director of EEOC's Office of Field Services provided the new Chairman of EEOC with an "option paper" outlining four alternative complaint processing systems.<sup>5/</sup> Two of the proposals included in the option paper were the EEOC proposal and the task force's proposal previously discussed in this chapter. The other two proposals are described below.

#### Centralizing intake and investigation in EEOC

This proposal would require complainants to file complaints with EEOC rather than their agencies. Investigations would be made by EEOC investigators rather than agency personnel, thus eliminating the need for a hearing since the EEOC investigator would be a neutral third party. Upon completion, the case file and the recommended decision would be sent to the agency by EEOC and the agency could accept, modify, or reject the recommended decision. The complainant would then have the right to appeal to ORA if he/she was not satisfied with the agency's decision.

#### Appellate hearing system

This proposal would permit agencies to design their own investigation systems. However, the agencies would be required to provide staff knowledgeable in the laws being enforced to receive and draft complaints and notify complainants of their administrative and statutory rights. The agencies would have 130 days from the filing date to settle or dismiss the complaint or issue a decision on the merits.

Upon receipt of the agency decision or upon the 180th day after filing, whichever occurs first, the complainant could appeal the matter to ORA. Appeals on procedural matters would be limited to appeals based on failure to apply EEOC regulations. ORA could request additional documentation, remand the case for further investigation, or hold a hearing to complete the administrative record and issue a decision.

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<sup>5/</sup>The new Chairman was appointed on May 12, 1982.

As in all other options, either party could request EEOC Commissioners to reconsider ORA's decisions.

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In mid-January 1983, the Chairman was still considering the option paper. An OMB official said that any regulations proposed by EEOC would require OMB's approval and that there was no estimated date for issuing new regulations.

## CHAPTER 4

### OTHER PROBLEMS LIMITING THE SYSTEM'S EFFECTIVENESS

Many agencies believe that EEOC complaints examiners and ORA frequently issue decisions that are either contrary to civil service law or impractical to carry out. Consequently, the agencies refuse to implement such decisions. Also, management problems at ORA caused friction between the agencies and EEOC. (When we completed our review, EEOC had taken a number of actions and planned additional ones to correct ORA's management problems.) We believe these issues, perhaps more than any others, have created in agencies a lack of confidence in EEOC's ability to provide oversight of the discrimination complaint processing system.

### AGENCIES ARE CRITICAL OF MANY EEOC DECISIONS

According to the task force report, the EEOC decisions do not reflect a consistency with or a conformity to applicable law. The report stated that EEOC complaints examiners often totally disregarded civil service laws and ordered relief for complainants which agencies were legally prohibited from providing. Representatives of many agencies with whom we spoke were critical of complaints examiners' application of law in arriving at decisions on discrimination complaints. They were also concerned that complaints examiners were rendering decisions that were impractical to carry out. Further, some agency representatives expressed similar concerns about decisions ORA rendered. The following are illustrative of some of the concerns agency officials expressed to us:

Veterans Administration representatives stated that both complaints examiners and ORA are "cavalier" in applying law. They said agencies cannot carry out decisions that are contrary to personnel regulations and suggested shifting oversight responsibility to an agency with "competency" in the personnel area.

Department of Commerce representatives said complaints examiners totally disregarded civil service laws in as many as 10 percent of their cases.

Department of Treasury representatives told us there have been cases in which complaints examiners and ORA have "attacked the Federal merit promotion system's basic elements as being too subjective."

Air Force representatives said the inconsistency of complaints examiners' recommended decisions and ORA's decisions with civil service law is the most serious problem in the discrimination complaint processing system.

EEOC's Chairman informed us that it is not his agency's position that the Civil Rights Act of 1964, as amended, takes precedence over everything else. He said, however, that the courts have indicated the pre-emptive nature of the act.

Our review disclosed no definitive court or administrative decisions on whether the Civil Rights Act of 1964, as amended, permits EEOC to grant remedies or approve settlements inconsistent with the civil service laws. Neither the Equal Employment Opportunity Act of 1972 nor its legislative history expressly provides an answer to this question.<sup>6/</sup> What is clear, however, is that until the point is resolved, it will remain a stumbling block to implementing EEOC decisions and settlements.<sup>7/</sup> According to some agency representatives, the effects of EEOC decisions which they believe are contrary to civil service regulations and laws are that agencies are

--refusing to implement such decisions made by complaints examiners and

--requesting reconsideration of such decisions made by ORA.

#### MANAGEMENT PROBLEMS AT ORA

Many agency representatives commented on problems experienced with ORA. For example, representatives of nine agencies

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<sup>6/</sup>The Civil Rights Act of 1964 prohibited employment discrimination on the basis of race, color, religion, sex, or national origin by private sector employers and State and local governments. The Equal Employment Opportunity Act of 1972 amended the 1964 act to provide similar protection from discriminatory employment practices to employees of and applicants for employment in Federal departments and agencies.

<sup>7/</sup>A recent GAO decision, B-206014, March 7, 1983, provides some guidance on appropriate remedies in an informal settlement of a discrimination complaint. The decision involved four cases in which the proposed settlements were questioned by the agencies involved because of perceived inconsistencies in the laws.

said that ORA had lost case files.<sup>8/</sup> The problem had become so severe for the Defense Logistics Agency and the Department of Labor that they now retain the files for their records and send only copies to ORA. In April 1982, the then Acting Executive Director of EEOC told us that an EEOC task force confirmed that ORA had lost case files and that, after losing the files, ORA would reconstruct them and then, sometimes, lose the reconstructed files.

Also, there were a number of instances in which ORA issued duplicate and even conflicting decisions on the same case. Representatives of the Departments of the Army, Labor, and the Treasury provided us with examples of such decisions. In the example provided by the Army, ORA issued one decision which affirmed and one which reversed the final agency decision. In the example provided by Labor, ORA issued one decision which affirmed the agency's final decision and another decision which remanded the case back to the agency for further processing. In the example provided by the Treasury, both decisions affirmed the final agency decision. Other instances of duplicate decisions rendered on the same cases were documented in congressional correspondence sent to EEOC's Office of Congressional Affairs.

Agency representatives also told us that ORA

- issued inconsistent decisions on similar cases;
- did not include the rationale for decisions reached;
- did not publish decisions;
- had an arrogant attitude toward agencies; and
- did not return telephone calls, was reluctant to answer questions, and provided poor guidance.

In a review requested by the Chairwoman, Subcommittee on Civil Service, House Committee on Post Office and Civil Service, we inquired into alleged operating and management problems at

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<sup>8/</sup>These agencies include the Departments of the Treasury, Commerce, Housing and Urban Development, Labor, the Army, the Navy and the Air Force; the Defense Logistics Agency; and the U.S. Postal Service.



Representatives of five agencies whom we contacted believed EEOC should have sufficient authority to monitor and ensure that agencies carry out their EEO responsibilities.<sup>11/</sup> Representatives of five other agencies believed that EEOC already has sufficient enforcement authority.<sup>12/</sup> Defense Logistics Agency representatives believed it would be unwise for EEOC to have additional enforcement power until it established policy on how to deal with the obligations an agency has under personnel laws and regulations.

Representatives of the American Federation of Government Employees, the National Alliance of Postal and Federal Employees, and the National Federation of Federal Employees believed that EEOC should be granted enforcement authority and should have the ability to apply sanctions. Representatives of the American Postal Workers Union believed that EEOC should be able to refer decisions which it does not have the authority to enforce to the Justice Department.

EEOC's Chairman informed us that, while his agency has no recourse to the courts to enforce its decisions on complaints filed by Federal employees, it has not found it necessary to establish regulations addressing administrative enforcement beyond those currently existing. He also advised us that, at this time, "...EEOC cannot say that what it needs is more authority in this regard."

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<sup>11/</sup>These agencies were the Departments of Health and Human Services, Housing and Urban Development, the Interior, and the Treasury; and the Veterans Administration.

<sup>12/</sup>These agencies were the Departments of the Air Force, the Army, and Transportation; the Defense Logistics Agency; and the U.S. Postal Service.

## CHAPTER 5

### CONCLUSIONS

On the basis of the preponderance of information we reviewed, we believe the discrimination complaint processing system is neither effective nor efficient. The time being taken to process complaints has steadily increased over the years, and the Government-wide inventory of complaints in process is increasing. We believe these problems are attributable to (1) poor case management by many agencies and by EEOC, (2) the cumbersome nature of the system, (3) conflict between agencies and EEOC, and (4) real or perceived differences between civil service and EEO laws and regulations and how they are applied.

Problems with the complaint processing system are not new. We reported on them in 1977. EEOC discussed them in its 1980 staff study. The task force addressed the problems in its 1981 report. And EEOC, in its 1982 staff study, again highlighted them. Thus, while there has been much problem identification during the past 6 years, no one has developed a practical solution.

The new EEOC Chairman is studying proposals for revising the current system. Although we hope the proposals will result in the system's becoming more effective and efficient, we are concerned that, no matter whether the system is revised or is replaced by a new one, its effectiveness and efficiency will continue to be impaired unless a sense of mutual respect and trust develops between the agencies and EEOC.

## CHAPTER 6

### AGENCY COMMENTS

As arranged with the subcommittee office, EEOC was the only organization asked to comment on the report draft. EEOC's comments, dated January 14, 1983, are included as appendix III.

While EEOC had questions about the accuracy or range of impact of some of the statements in the report, it said the report raised a number of legitimate criticisms. Where appropriate, clarifying revisions were made to the report to deal with the questions raised by EEOC.

EEOC described recent steps it had taken to address concerns raised in the report. According to EEOC, it has developed proposed interim regulations and circulated a Notice of Proposed Rulemaking that deal with task force concerns about such matters as (1) the reprisal charge process, (2) the confusion concerning alternate methods for processing complaints, and (3) the requirement to continue processing complaints where complainants have refused an offer of full relief. EEOC expects these measures will be in place within a few months and will resolve the agencies' concerns about these issues.

EEOC also said it is establishing a quality assurance program for the hearing function to increase the quality and consistency of recommended decisions and proposed remedies. EEOC expects that this will alleviate some of the problems, or perceived problems, identified by the agencies. Further, EEOC informed us it has assigned four senior attorneys to ORA to assure quality drafting of decisions and that the percentage of petitions to reopen cases has declined from about 26 percent to less than 10 percent.

EEOC said that it had taken several initiatives to correct other problems at ORA. These included eliminating duplicate files, establishing a professionalized intake review system, and developing an internal manual and format on standards for writing decisions on appeals of agency decisions. Concerning agency statements about ORA's inconsistent decisions, failure to publish decisions, and poor communications with agencies, EEOC said a number of actions had been taken including

- having ORA's supervisors meet twice a week to discuss common cases,
- negotiating with a contractor to index and microfiche decisions, and
- establishing an "officer of the day" system at ORA.

EEOC commented on the task force's views concerning the standard or scope of EEOC's appellate review (see pp. 12 and 14). According to EEOC, the nature of the process in the agencies is not comparable to that of a district court because there is no formal adjudicative process for the parties to present their case to an impartial tribunal, and witnesses are not cross-examined. EEOC also said that, while an agency's EEO office may conduct an impartial investigation, the agency charged with discrimination also renders the final decisions. EEOC believes that these two factors place tension upon the application of the traditional appellate standard of review.

According to EEOC, ORA tries to review an agency decision in the same way an appellate court reviews a trial court's decision, and confines its review to the record. However, when a hearing had been held, ORA gives deference to the hearing examiner's findings.

Further, EEOC said that civil rights laws and personnel laws can be construed "harmoniously" where inconsistencies exist between such laws. EEOC informed us that it does not doubt that some recommended remedies, in cases where complaints examiners found discrimination, conflict with agency personnel policies and practices, but that it does doubt that there are many instances where those remedies conflict with civil service law. EEOC stated that 530 cases were closed in fiscal year 1981 with findings of discrimination and recommended remedies and that it doubts whether more than 100 recommended remedies were controversial or whether more than a few dozen appeared to impinge on civil service law.

There is clearly a substantial difference of opinion between EEOC and many agencies about the range of impact of this issue. The task force highlighted the matter in its report. Also, the problem surfaced during our discussions with representatives of many agencies as being a serious problem in the complaint processing system.

We do not know how many recommended remedies may impinge on civil service law. Nevertheless, if, as EEOC suggests, even only "a few dozen" of the 530 cases closed in fiscal year 1981 with findings of discrimination included recommended remedies that agencies believed they were legally prohibited from providing, this would represent an incidence rate approaching one out of every 10 to 15 such cases. There are undoubtedly many who would argue that this was indicative of a serious problem.

AGENCIES, UNIONS, MANAGEMENT GROUPS, ANDAGENCY EEO ADVISORY COUNCILS CONTACTEDAGENCIES

Department of the Air Force  
Department of the Army  
Department of Commerce  
Department of Education  
Department of Health and Human Services  
Department of Housing and Urban Development  
Department of the Interior  
Department of Labor  
Department of the Navy  
U.S. Postal Service  
Department of Transportation  
Department of the Treasury  
Defense Logistics Agency  
Veterans Administration  
Office of Management and Budget  
EEOC

FEDERAL EMPLOYEE UNIONS

American Federation of Government Employees, AFL-CIO,  
Washington, D.C.  
American Postal Workers Union, AFL-CIO, Washington, D.C.  
General Service Employees' Union, S.E.I.U., Syracuse, N.Y.  
International Association of Machinists and Aerospace Workers,  
AFL-CIO, Washington, D.C.  
International Federation of Professional and Technical  
Engineers, AFL-CIO and CLC, Silver Spring, Md.  
National Association of Government Employees, Boston,  
Mass.  
National Alliance of Postal and Federal Employees, Washington,  
D.C.  
National Federation of Federal Employees, Washington, D.C.  
National Treasury Employees Union, Washington, D.C.  
National Association of Letter Carriers, Washington, D.C.

MANAGEMENT GROUPS

Senior Executive Association, Washington, D.C.  
Federal Managers' Association, Arlington, Va.  
Professional Managers Association, Washington, D.C.

EEO ADVISORY COUNCILS

Veterans Administration

Department of Agriculture Agencies

Animal, Plant Health Inspection Service

Soil Conservation Service

Farmers Home Administration

Forest Service

U.S. Postal Service

Department of the Navy

NINETY-SEVENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
MANPOWER AND HOUSING SUBCOMMITTEE  
OF THE  
COMMITTEE ON GOVERNMENT OPERATIONS  
RAYBURN HOUSE OFFICE BUILDING, ROOM B-349-A  
WASHINGTON, D.C. 20515

November 16, 1981

Honorable Charles A. Bowsher  
Comptroller General  
U.S. General Accounting Office  
441 G Street, N.W.  
Washington, D.C. 20548

Dear Mr. Bowsher:

Information available to the Subcommittee indicates that serious problems continue to exist in the Federal Government's system for processing and resolving complaints alleging discrimination in employment because of race, religion, sex, etc. The system for processing equal employment opportunity complaints is a vital element of the Federal Government's attempt to eliminate unequal treatment within the Federal workforce. It is intended to protect the rights of equal opportunity for employees while protecting federal agencies and their supervisory personnel against unsupported allegations of discriminations.

Many of the problems addressed by the recommendations of your office's 1977 report (FPCD-76-77) still exist. In many agencies, it still may take literally years for the system to generate a decision on the merits. There are reports that pipeline is cluttered with frivolous complaints while inefficient operations delay or undermine many substantive complaints. Several large agencies continue to have serious problems with timely processing of discrimination complaints, despite standards and promises to improve. If equal opportunity is to be achieved, the system that was created to decide specific Federal employee complaints must be as effective and efficient as possible.

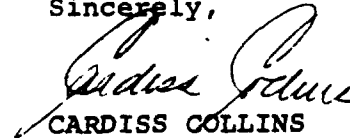
Accordingly, this is to request that your office undertake a study of the equal employment opportunity complaints processing system for Federal employees. The study should document the kinds

Honorable Charles A. Bowsher  
Page 2

and extent of problems now being encountered, identify the causes, and recommend remedial action. In addition, it should comment on the role that the Equal Employment Opportunity Commission should play to ensure that the system is effective, efficient, and fair to all federal employees and agencies.

In coordinating this request for the Committee, questions should be directed to Mr. Joseph C. Luman, Staff Director, at 225-6751. We look forward to working with your office and trust that the requested study will further the contribution GAO has already made to this important area.

Sincerely,



CARDISS COLLINS  
Chairwoman, Manpower & Housing  
Subcommittee

LW:js





EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON, D.C. 20506

JAN 14 1983

Mr. Philip A. Bernstein  
Director  
Human Resources Division  
General Accounting Office  
Washington, D.C. 20548

Dear Mr. Bernstein:

Thank you for providing me with a draft of the General Accounting Office's (GAO) proposed report to the Subcommittee on Manpower and Housing of the House Committee on Government Operations, entitled "Problems Persist in the EEO Complaint Processing Systems for Federal Employees." Our comments on the proposed report follow.

Chapters 1, 2 and 3 of the proposed report raise a number of legitimate criticisms and suggest viable solutions; nevertheless, we cannot agree with the accuracy or the range of impact of some of the statements contained in those chapters. I would point out in this regard that no member of the GAO staff spoke with either the Director of the Office of Review and Appeals, or any other official in that office, in preparation of the instant proposed report. Furthermore, the proposed report makes no mention of the fact that the Equal Employment Opportunity Commission (EEOC) sponsored a three day conference in February of 1982 to discuss mutual problems, concerns and progress in the processing of discrimination complaints, to which all agency EEO directors were invited.

[See GAO notes 1 and 2, p. 39.]

Recent Steps Taken By EEOC To Clarify Certain Areas Of Agency Concern:

The report noted agency concern with such things as the reprisal charge process, mixed cases involving MSPB, the dual processing of complaints and grievances and the requirement that cases be processed where complainants have refused full relief. All of these areas are being addressed in EEOC's proposed interim regulations, or in a recently circulated Notice of Proposed Rulemaking. Those documents are attached, respectively, at Tabs A and B. We expect that the regulations will be in place within a few months and that they will resolve those particular concerns raised by the agencies.

In addition, as stated in the proposed report, I have received a staff option paper which articulates a number of alternative Federal EEO complaint processing systems. When a determination is made as to the best course of action to be taken in revising the present system, processing of those revisions can be expedited due to the preparatory groundwork already laid.

[See GAO note 3, p. 39.]

Page 2 - Philip A. Bernstein

The proposed report also noted agency concern with some aspects of the hearings program. We are moving to establish a quality assurance program for the hearing function in order to increase the quality of, and consistency among, recommended decisions and proposed remedies on a nation-wide scale. It is expected that this will alleviate some of the problems, or perceived problems, identified by the agencies.

Detailed Comments:

1. Reasons for the Establishment of the System: The proposed report states on page 1 that one of the reasons the complaint processing system was established was to protect agencies and supervisory personnel from unsupported allegations of discrimination. We are unable to find the source for this statement, and it is not clear that this system, or any other system, could protect personnel from unsupported allegations of discrimination. The complainant cannot be denied access to the system because he/she fails to support (i.e., provide evidence for) his/her allegations. The obligation to find support or lack of support, for allegations lies with the investigatory body. [See GAO note 4, p. 39.]

2. Complaint Processing Costs: On page 9, figures published by the Commission for the total number of complaints filed in FY 81 were used in combination with the Office of Management and Budget's (OMB) figure of \$8,000 in costs per complaint closure to come up with a grand total of \$91.2 million having been spent to close Federal EEO complaints in FY 81. However, the OMB figures applied only to agencies other than the U.S. Postal Service (USPS), while EEOC figures applied to closures by all agencies, including USPS. Further, the \$8,000 figure only represents certain salaries used to process complaints, not costs to close. Other costs not included are an agency's costs of counseling, personnel benefits, overhead, and EEOC's hearings and appeals costs. A more accurate estimate of the costs for closing a complaint might be considerably higher than the \$8,000 mentioned in the report. At the aforementioned EEO conference in February of 1982, the consensus of the EEO directors was that the average cost for the administrative processing of an EEO complaint was actually between \$20,000 and \$40,000.

3. Problems in the Hearing Program: The proposed report cites, on page 21, agency criticism of Complaints Examiners who were said to "... totally disregard civil service laws and order relief for complainants which agencies are legally prohibited from providing." Although we do not doubt that some recommended remedies, in cases where Complaints Examiners have found discrimination, conflict with agency personnel policies and practices, we do doubt that in very many instances those recommended remedies conflict with civil service laws. In addition, it is not EEOC's position, as implied in the report, that Title VII of the Civil Rights Act of 1964, as amended, takes precedence over everything else. I would point out, however, that the courts have indicated the pre-emptive nature of Title VII. See, e.g., Brown v. General Services Administration, 425 U.S. 820 (1976) and Luevano v. Campbell, 93 FRD 68

Page 3 - Philip A. Bernstein

(D.D.C. 1981). EEOC Complaints Examiners are trained and instructed to recommend remedies which conform with generally accepted Federal sector personnel rules and regulations. There are, indeed, some areas of controversy between EEOC and the Office of Personnel Management (OPM) concerning the proper way to remedy individuals who have suffered from discrimination. Those areas of controversy, however, are not at issue in most remedy recommendations of Complaints Examiners. For instance, of the 11,457 cases closed in FY 81, only 530 actually resulted in a finding of discrimination with recommended remedies. We doubt that more than one hundred recommendations were controversial or that more than a few dozen appeared to impinge on civil service law. In sum, we would suggest that very few recommended decisions (fewer than one percent of all closures) proposed remedies which Federal agencies believed they were legally prohibited from providing.

As the proposed report points out, the average number of days from receipt of a request for a hearing to issuance of the recommended decision in FY 81 was 261 days. However, fewer complaints actually went to hearing in FY 81 than were estimated in the FY 81 report (the actual figure was 3,118 of 11,457, or 28 percent). Thus, the impact of EEOC's processing time is less than stated. [See GAO note 5, p. 39.]

4. Decisions Rendered by the Office of Review and Appeals: With respect to the statements made in Chapter 4 of the proposed report concerning decisions rendered by the Commission's Office of Review and Appeals (ORA) and the management of that office, we have attached for your information a copy of my letter dated September 27, 1982 to the Honorable Patricia Schroeder, Chairwoman of the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service (Tab C). That letter was prepared in response to her transmittal to me of GAO's report, No. FPCD-82-68, entitled "Inquiry Into Alleged Operating and Management Problems in EEOC's Office of Review and Appeals" which was prepared at her request. [See GAO note 6, p. 39.]

I would like to respond to the following specific items with respect to ORA which are raised in the proposed report.

a. EEOC's Standard of Review

At page 12 of the proposed report, it is stated: "According to the task force report, the standard or scope of review EEOC exercises in its appellate jurisdiction is not clear. The task force believed that EEOC does not give the deference to an agency's final decision that an appellate body should."

Page 4 - Philip A. Bernstein

It should be noted that the nature of the process in the agencies is not at all comparable to that of a district court. There has been no formal adjudicative process in which the parties each present their case to an impartial tribunal. The witnesses have not been cross-examined or their demeanor observed. Although an agency EEO office may serve as an impartial investigative body, ultimately the agency's final decision is issued by the same body that is charged with the discrimination. These two factors, the investigative process, as opposed to the adjudicative, and the institutional bias in the ultimate decision-maker, place a tension upon the application of the traditional appellate standard of review. While it may be true that with the time pressures of the office, caused by the backlog, decisions are produced which could be considered brief, the traditional standards of review are applied to the review of the appeals.

With respect to the specific question raised, we do try to review an agency decision the same way the appellate court reviews a trial court decision. Our review is confined to the record. We apply a standard of reasonableness when it comes to factual findings. When a hearing has been held we, of course, give deference to the hearing examiner, specifically, as to findings based on credibility and demeanor.

b. EEOC's Application of Case Law and Civil Service Law

The proposed draft report, at page 13, cites the task force report to the effect that "EEOC does not apply case law and often totally disregards civil service law." We take the position that civil rights laws and the personnel laws can be construed harmoniously. We have attached a letter from EEOC to a government agency explaining how a careful statutory analysis of Section 717 of Title VII of the Civil Rights Act of 1964, as amended, can be harmonized with a recurring inconsistency between a personnel law and Title VII. (Tab D)

We would advise that the ORA has developed an internal manual and format on standards. It now runs approximately 200 pages and is supplemented periodically. Agencies have cited it for its excellence. A copy of the index of the manual and the format on standards is attached. (Tab E) Since the manual is quite voluminous, we will provide you with the body of the manual on request.

c. Quality of Office of Review and Appeals Decisions

The proposed report, at pages 21 through 22, cites the Task Force's report criticizing the quality of ORA's decisions.

We have assigned four senior attorneys to ORA to assure quality drafting of decisions. Further, with respect to this particular criticism, we would like to point out that the percentage of petitions to reopen has declined from about 26 percent to less than 10 percent. This indicates a high level "satisfaction" with EEOC's decisions.

Page 5 - Philip A. Bernstein

d. EEOC Does Not Have Authority to Enforce Its Federal Sector Decisions

The draft report states, at page 24 that "Civil rights laws do not provide EEOC with authority to enforce its decision on discrimination complaints filed by Federal employees."

It is, of course, true that the EEOC has no recourse to the courts for the enforcement of its decisions on complaints filed by Federal employees. It is also true that the EEOC has not found it necessary to establish regulations addressing enforcement in the administrative sphere beyond those currently existing. While the EEOC could perhaps do so, the more pertinent question is whether it should. It has been mentioned by some agencies that the former Civil Service Commission (CSC) had the authority to withhold the salaries of non-complying agency heads. The suggestion has been made that the EEOC should exercise similar authority. While many agencies are familiar with the CSC regulations, few are aware that the CSC never found it necessary to use this authority. A careful system of fellowship sufficed to produce compliance. At this point in time, EEOC cannot say that what it needs is more authority in this regard.

In early 1981, the position of Compliance Officer was established in ORA. More than 500 compliance inquiries were resolved during the period beginning June 15, 1981 and ending November 1, 1982. Of that number, only two cases of agency defiance came to the attention of the compliance officer. One case is currently being resolved. In the other case, the agency contends that the ORA decision was contrary to EEOC regulations. This issue is under consideration by our Office of the Legal Counsel.

e. Duplicate Files and Files in Disarray

With respect to the statements at page 24, of the proposed report regarding the existence of duplicate files and of administrative files being in disarray, the duplicate files were weeded out in June of 1982 by a task force of EEOC employees and a professionalized in-take review system was established. That same task force placed the files in order at that time.

f. Inconsistent Decisions, Publications of Decisions and Communications with Agencies

Finally, with respect to statements attributed to unidentified agency representatives regarding so-called "inconsistent decisions" by ORA, failure by EEOC to publish its decisions, and the quality of ORA's communications with the agencies, I would advise that:

Page 6 - Philip A. Bernstein

1. The ORA now has supervisors' meetings twice a week to discuss common cases;
2. It is currently expected that the decisions will be indexed and microfiched by the end of this summer; we are now negotiating with a contractor in this regard; and
3. The office has an officer of the day system; tight logs are kept. Also, the Director and staff have planned regular meetings with EEO officials in major agencies. Now that ORA has reduced its backlog, fewer calls are received from agencies.

I hope these comments are helpful to you in preparing your report and that you will let me know if you have any further questions.

Sincerely,



Clarence Thomas

Enclosures (See GAO note 7, p. 39.)

- GAO notes:
1. When we were conducting the review that led to developing this report, we also made the review of operating and management problems at ORA. (See p. 23.) In performing the latter review, we held numerous discussions with ORA's Acting Director (subsequently appointed Director) and his staff. Since, as shown elsewhere in this report, both reviews covered many of the same problems, no useful purpose would have been served by holding separate discussions for each review on the same subjects.
  2. After receiving EEOC's comments and learning about the February 1982 conference, we obtained from EEOC and reviewed its records of the conference and found that they contained no information indicating that revisions to our report were necessary.
  3. Page references have been changed to agree with the final report.
  4. The sentence referred to in this comment has been revised to prevent misinterpretation.
  5. The percentage of complaints closed during fiscal year 1981 that went to hearings which we cited in our draft report was obtained from an EEOC report. We have amended our report to show EEOC's revised estimate of 28 percent.
  6. The EEOC Chairman's September 27, 1982, letter to the Chairwoman of the Subcommittee on Civil Service, House Committee on Post Office and Civil Service, is included as appendix IV.
  7. Because of their length, all enclosures except Tab C have been omitted. Tab C is included as appendix IV.



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON, D.C. 20506

SEP 27 1982

Honorable Patricia Schroeder  
Chairwoman  
Subcommittee on Civil Service  
Committee on Post Office  
and Civil Service  
House of Representatives  
Washington, D. C. 20515

Dear Chairwoman Schroeder:

I am in receipt of your letter transmitting a copy of the GAO Report, "Inquiry Into Alleged Operating and Management Problems in EEOC's Office of Review and Appeals," No. FPCD-82-68. As stated in the report, steps have been taken to address the management deficiencies in the Office of Review and Appeals (ORA). This letter will provide you with an update on these measures.

The allegations against ORA can be grouped into four major problem areas: handling of paperflow, case production, quality and consistency of cases, and the general management tone in the office. My analysis of these allegations and actions taken or to be taken to correct them are grouped accordingly.

1. Handling of paperflow

There was a serious backlog in the office, but as noted by the report, a task force was set up in ORA and, in fact, cleared up this backlog as of June 1982. Beyond this, I have taken the following steps to assure that the operation will continue to be effective and on a current basis:

- Three additional staff persons, including a paralegal, have been assigned to the control unit;
- A control manual outlining permanent procedures has been drafted and I expect to have it issued by October 1; and
- Each control function is assigned to a designated staff person, with daily reports on control activity furnished to the Office Director.



On a more general level, guidance has been provided to the control unit so that it can filter out "non-charges," i.e., duplicates and late filings. This appears to have had a significant effect in improving the operation, in that it has reduced the number of receipts by 10 percent by trimming out duplicate and untimely cases.

In an effort to further screen cases, an "Appeal Form" has been developed and sent to Office of Management and Budget and National Archives and Records Service for approval. The form asks a complainant to provide elementary information on his or her case and to state briefly his or her reasons for appealing. With the use of the form, we hope to refine our intake procedures so that nonjurisdictional matters can be screened out and we will be able to more efficiently process those cases which we do not accept. A similar intake form has been used in the private sector with great success. Finally, the process for Commission review of proposed appeal decisions is being streamlined by eliminating certain clearance points outside the office and placing tight time frames on clearance areas.

## 2. Production

As the report notes, the production rate was two cases per week per attorney. Inventory was at 2050 cases (or eight months, since that office takes in 3100 cases per year). The following has taken place:

- The production standard has been raised from 2 cases per attorney per week to 3.5 cases. Production is presently at 3.7 cases, or from 47 cases per week to 87 per week;
- The inventory of current and backlogged appeals is now 1750 cases; and
- A special track has been set up for processing backlogged, or pre-1982 cases. These have been reduced from 700 to 200.

Supervisors provide weekly detailed case reports to the Director of ORA. As with all headquarters office heads, the Director reports to me on production and other activities on a bi-weekly basis.

Also, as I stated earlier, ORA has prepared an extensive manual with formatted paragraphs so as to facilitate speedy case preparation. These are tied into the word processing machines noted in the GAO Report and have already won acclaim from other Federal agencies.

### 3. Quality and Consistency

Since I came to the Commission, I have been concerned about the quality of our work. A numerical achievement must be combined with a quality work product. Within a month after assuming office, I revised the performance standards for the Commission's 33 senior managers to better emphasize quality performance. This is critical in the Office of Review and Appeals where a clarity and accurateness of presentation is essential.

Also, at ORA a senior attorney has been assigned to the office to review complex cases, prepare monthly guidance memoranda on selected topics, and to develop a manual consolidating these memoranda. The manual is expected to be completed by November 1, 1982. This will provide staff guidance on difficult legal and policy issues. Finally, as part of our reorganization, we are firming coordination between ORA and the offices processing private sector cases.

### 4. Overall Management

The GAO Report noted problems ranging from morale to time and attendance. Most of these matters are being addressed, and indeed, I consider that the office is now run on a highly professional basis. For example, monthly staff meetings are held; supervisors meet twice a week; time and attendance is strictly monitored; and weekly production reports are submitted to the office Director. I personally receive and review the bi-weekly reports, so that problem areas can be quickly identified and addressed.

I am monitoring ORA's office progress carefully. I have appointed a permanent office head, who has served as Acting Director and is a seasoned manager and provides the office with stability and leadership. I have visited the office and met with the supervisors on two occasions. These personal meetings, I understand, were a first, that a Chairman has shown that much personal interest in the operation of ORA. I will continue to do so.

Other management problems in the office stem from the Federal charge-processing system itself. The system is complex, with the result that 60 percent of the cases that come to the office raise procedural issues, making it difficult to get to the merits of the cases. Further, the appellate procedures themselves are generalized, which results in confusion and delay. This month, the Commission will be considering a series of regulations to address these problems. Highlights include regulations which will provide:

- A clearer delineation of EEOC and MSPB roles in "mixed" cases, i.e., where cases allege employment actions prohibited by laws administered by both agencies;
- The relationship between the agency EEO procedure and contract grievance procedure and our appellate role with respect to contract grievance procedures;
- A procedure for dismissing cases where the agency offers a settlement providing full relief at any stage of the process;
- A procedure for consolidating like charges;
- A revised definition of interlocutory or "partial" appeal;
- A procedure for allowing ORA to dismiss a case if it is in the courts; and
- Revision of the procedures for investigating and appealing reprisal complaints.

My strong commitment and concern for the mission of EEOC is a matter of record. I believe we must continue to improve our internal management capacity in order to provide the best possible service to all who, as you state in your letter, "[are]...suffering from discrimination...." It is for this reason that I am reorganizing the Commission.

The Commission has already voted to reorganize EEOC Headquarters, and we have a study underway to reorganize the field. Once the reorganization is consummated, the Commission will be in a better position to reduce internal coordination problems in case-processing, litigation, policy development and management areas, strengthen management accountability and improve management oversight in the field.

As I stated in my testimony before our Senate oversight committee, improvements of the Federal EEO process will be one of my major concerns during the next year. I have every confidence that the improvements we have started to see will continue. You have my assurance that I will continue to personally focus my attention on this critical office in EEOC, and will provide you with a three-month update on the status of that office, as requested.

Sincerely,

Clarence Thomas  
Chairman

(966074)

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